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In the Supreme Court of the United States

OCTOBER TERM, 1984

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a federal agency's compliance with Office of Management and Budget Circular A-76, an Executive Branch management policy directive that establishes guidelines for agency decisions whether to contract out functions to private enterprise, and with laws and regulations concerning contracting out is a proper subject of negotiation and arbitration between the agency and an employee union under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*

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EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-37a) is reported at 744 F.2d 842. The decision and order of the Federal Labor Relations Authority (App., *infra*, 40a-48a) is reported at 10 F.L.R.A. 3.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 49a-50a) was entered on September 21, 1984. A timely petition for rehearing was denied on December 3,

1984 (App., *infra*, 38a-39a). On February 26, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

5 U.S.C. 7103(a)(9) provides:

"[G]rievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. 7106 provides:

Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to deter-

mine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. 7117(a)(1) provides:

Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

STATEMENT

1. In October 1978 Congress enacted the Civil Service Reform Act of 1978 (the Act), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* Title VII of the Act, 5 U.S.C. 7101 *et seq.*, governs labor-management relations, including

collective bargaining, for nearly all federal agencies.[1] Title VII replaced the federal labor relations program created in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.).[2]

Under the Act, a federal agency is required to bargain in good faith with a federal employee union about conditions of employment. 5 U.S.C. 7103(a)(12), 7114(b)(2); *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, No. 82-799 (Nov. 29, 1983), slip op. 2-3. "[C]onditions of employment" are defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. 7103(a)(14). The Act provides that if an impasse is reached, either party to the negotiations may ask the Federal Service Impasses Panel (the Panel) to intervene. 5 U.S.C. 7119(c). The Panel has the authority to judge a proposal on its merits and to order the parties to adopt it. 5 U.S.C. 7119(c)(5)(B) and (C); see 5 C.F.R. 2471.11(a). Thus, unlike the situation in the private sector, a determination that a bargaining proposal is negotiable carries with it the possibility that the proposal ultimately will be incorporated as part of the collective bargaining agreement pursuant to an order of the Panel. A union may use the grievance and arbitration process to challenge management actions that

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[1] Certain federal employees, including members of the uniformed services and the Foreign Service, and certain agencies, including the General Accounting Office, Federal Bureau of Investigation, Central Intelligence Agency, and National Security Agency, are excluded from the coverage of Title VII. See 5 U.S.C. 7103(a)(2) and (3). United States Postal Service employees also are excluded from Title VII coverage, since labor relations matters involving those employees are within the jurisdiction of the National Labor Relations Board. See 39 U.S.C. 1209.

[2] The executive order program was revised and continued by Executive Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Executive Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

allegedly violate the collective bargaining agreement. 5 U.S.C. 7103(a)(9)(C)(i), 7121.

Congress excluded from the requirements of the Act matters affecting certain management rights, including the right "to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B). An agency's duty to bargain with respect to these reserved rights is limited to the "procedures which management * * * will observe in exercising" the rights and "appropriate arrangements for employees adversely affected" by exercise of the rights. 5 U.S.C. 7106(b)(2) and (3). The Act also precludes an agency from bargaining when it would be "inconsistent with any Federal law or any Government-wide rule or regulation" and over any "matters which are the subject of * * * a Government-wide rule or regulation." 5 U.S.C. 7117(a)(1).

The Act established the Federal Labor Relations Authority (FLRA or Authority) as a three-member independent body within the Executive Branch with responsibility for, inter alia, supervising the federal collective bargaining process and the grievance and arbitration machinery established by Title VII. Among other responsibilities, the Authority adjudicates negotiability disputes and unfair labor practice complaints and reviews arbitral awards. 5 U.S.C. 7105(a)(2)(A)-(I). The Authority may seek enforcement of its orders in appropriate United States courts of appeals. 5 U.S.C. 7123(b). Persons, including federal agencies, who are aggrieved by certain types of FLRA orders may seek judicial review in the courts of appeals. 5 U.S.C. 7123(a).

2. In 1980, during the course of contract negotiations with the Equal Employment Opportunity Commission, respondent American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals (the union) proposed the following contract provision:

> The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting-out.

App., *infra*, 40a. Office of Management and Budget Circular A-76, to which the proposal refers, is a management policy directive applicable to all Executive Branch agencies that establishes guidelines for agency decisions whether to contract out to private enterprise for products and services the government needs. The EEOC took the position that the duty to bargain in good faith did not extend to the union's proposal and that bargaining on such matters "would be inconsistent with law, rule and regulations" (C.A. App. 9). The union subsequently submitted the proposal to the FLRA for a negotiability determination (*id.* at 1-2).

3. The FLRA ruled that the union's proposal was negotiable (App., *infra*, 40a-48a). The Authority recognized that the proposal addressed a subject listed in the management rights provision of the Act, 5 U.S.C. 7106(a) (App., *infra*, 40a-41a). The Authority nevertheless concluded that the proposal would not contravene that provision, because it "would contractually recognize external limitations on management's right but would not establish, either expressly or by incorporation, any particular substantive limitations on management" (*id.* at 41a).

The Authority also acknowledged that bargaining about the union proposal ultimately could result in subjecting disputes about compliance with Circular A-76 to the grievance and arbitration process, in apparent conflict with the exclusive nature of the appeals procedure provided in the Circular (App., *infra*, 42a). It concluded, however, that even assuming the existence of a conflict between the proposal and the Circular and that the latter fit within the statutory definition of a "Government-wide rule or regulation," the Circular could not "limit the *statutorily* prescribed scope and

coverage of the parties' negotiated grievance procedure" (*ibid.*; emphasis in original).[3]

4. A divided panel of the court of appeals enforced the order of the Authority (App., *infra*, 1a-37a). The court concluded that the union proposal would not unduly restrict management's reserved right to make contracting-out determinations for two reasons. First, the court reasoned that the phrase "in accordance with applicable laws" in the management rights clause, 5 U.S.C. 7106(a), operated to restrict the authority reserved to management. Thus, while agencies generally need not bargain with respect to their right to make contracting-out determinations, the court concluded that they were required to bargain about the duty to comply with all "applicable laws" affecting that right. App., *infra*, 8a-11a.

Second, the court of appeals concluded that the union proposal would not divest management of any existing control over the contracting-out process. The court believed that a union claim that management had failed to comply with contracting-out guidelines would fall within the statutory definition of a grievance, 5 U.S.C. 7103(a)(9), and that arbitrators therefore would have jurisdiction to decide such claims even if there were no collective bargaining agreement provision requiring compliance. App., *infra*, 11a-16a.

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[3] The Authority also found negotiable a proposal that the EEOC should notify the union of its intention to solicit bids for contract work that could result in reductions-in-force or transfers affecting employees, with a full explanation of the reasons for the agency's actions and opportunity for the union to respond in writing. The Authority found nonnegotiable a proposal that would have required the EEOC to minimize the effect of contracting-out decisions on employees, on the ground that the proposal would interfere with management's statutorily reserved right to lay off employees. App., *infra*, 43a-47a. Neither of these determinations is at issue at this stage of the proceedings.

The court of appeals also rejected the EEOC's claim that the union proposal was inconsistent with the exclusive appeals procedure established by Circular A-76. In the court's view, allowing the text of the Circular to restrict the scope of grievances under the Act would inject limitations not created by Congress. App., *infra*, 16a-17a.

Judge MacKinnon dissented (App., *infra*, 18a-37a). He concluded that the union proposal conflicted with the plain language of the management rights provision because it required compliance with substantive policy-making criteria for contracting out (*id.* at 22a-26a). Judge MacKinnon also determined that alleged violations of Circular A-76 would not be statutorily grievable in the absence of a contractual provision requiring compliance with such directives because the Circular does not "affect[ ] conditions of employment" within the meaning of 5 U.S.C. 7103(a)(9). Inclusion in a collective bargaining agreement of an agency commitment to comply with the terms of the Circular therefore would permit a union to obtain arbitration of issues that otherwise would not be grievable and would allow arbitrators to review determinations specifically committed to agencies by the management rights provision of the Act. App., *infra*, 29a-36a.

The court of appeals denied the EEOC's petition for rehearing with suggestion for rehearing en banc, with Judges Bork, Scalia, and Starr dissenting from denial of the suggestion for rehearing en banc (App., *infra*, 38a-39a).

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning administration of the federal labor relations program established under Title VII of the Civil Service Reform Act of 1978. The court of appeals' decision requires a federal agency to bargain with the union about a proposed collective bargaining agreement provision that

would require the agency to comply with Office of Management and Budget Circular A-76, an executive management policy directive that establishes guidelines for determinations whether to contract out agency functions to private enterprise.[4] The decision opens the door to a system under which labor arbitrators (with ultimate enforcement by the FLRA) may review substantive agency contracting-out determinations, despite Congress's specific reservation of such determinations to management under 5 U.S.C. 7106(a). In view of the economic interest of their members in any determination to contract out an agency function, federal employee unions have a strong incentive to mount vigorous challenges to such determinations and to search diligently for arguable agency violations of the detailed provisions of Circular A-76. As Judge MacKinnon explained, the decision creates an "extraordinary potential for vexatious litigation" (App., *infra*, 36a) and affords unions "a fertile source of weapons for obstructing or delaying contracting-out decisions, a situation Congress specifically sought to prevent" (*id.* at 35a).

The system of arbitral review authorized by the decision below would undermine seriously the potential for realizing efficiency gains through the contracting-out process. The Office of Management and Budget advises us that the estimated loss in cost savings to the federal government from delays due to arbitral review of disputes concerning future contracting-out determinations would amount to approximately $142 million for the pe-

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[4] The union proposal refers to compliance with Circular A-76 and "other applicable laws and regulations concerning contracting-out." See App., *infra*, 40a. The EEOC does not have its own contracting-out regulations, but it is generally subject to the provisions of the federal acquisition regulations, 48 C.F.R. Ch. 1. Since the parties in this case have focused on Circular A-76, we will refer primarily to the Circular in this petition.

riod from fiscal year 1986 through fiscal year 1989.[5] Potential contractors may become reluctant to bid on government projects, since market changes during the period of arbitral review may render the original bids obsolete. Losses also may result if an agency elects to proceed with a project while a grievance is pending and an arbitrator later disagrees with the agency's judgment concerning the application of Circular A-76 and orders rescission of the contract and back pay for displaced federal employees. The decision below thus creates a serious potential for slowing the contracting-out process very significantly, or even halting it entirely.

The impact of the decision below extends beyond the area of contracting out. Under the court of appeals' reasoning, it appears that a union could obtain arbitral review of an agency's exercise of any of the enumerated rights reserved to management under the Act merely by asserting that the agency had failed to comply with some relevant legal requirement. In addition, by extending its analysis to Circular A-76, an executive management policy directive, the court of appeals appears to have created a precedent for other steps that would infringe on the President's inherent authority to manage Executive Branch agencies. Review by this Court is plainly warranted.

1. OMB Circular A-76 was issued by the Office of Management and Budget, a part of the Executive Office of the President, pursuant to delegated presidential management authority. The Circular establishes "the policies and procedures used to determine whether needed commercial or industrial type work should be done by contract with private sources or in-house using Government facilities and personnel." 44 Fed. Reg.

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[5] See page 11, *infra*, for an estimate of cost savings now being realized by the Department of Defense from past contracting-out determinations.

20557 (1979).[6] The Circular prescribes detailed steps that agencies should follow in making the cost analyses that are used to determine whether to contract out to private industry for goods and services the government needs or to retain performance of a function in-house. The Department of Defense has reported that Circular A-76 studies it has completed since 1979 now generate more than $409 million annually in cost reductions. U.S. Office of Management and Budget, *Management of the United States Government: Fiscal Year 1986*, at 45 (1985). The President has established as a priority program the implementation of various efficiency measures, including increased use of contracting out pursuant to Circular A-76. *Id.* at 43-46; U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1986*, at 2-26 (1985).[7]

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[6] The longstanding policy of the federal government to acquire needed goods and services from the private sector whenever it would be feasible and efficient to do so was first recognized officially in Bureau of the Budget Bulletins, issued in 1955, 1957 and 1960. In 1967, this policy was expressed and implemented in a directive known as Circular A-76. See 44 Fed. Reg. 20558 (1979). The Circular was revised substantially in 1979. 44 Fed. Reg. 20556. It has been amended in several respects since then. See 45 Fed. Reg. 69322 (1980); 47 Fed. Reg. 6511 (1982); *id.* at 46783; 48 Fed. Reg. 37114 (1983). The 1979 version of the Circular was in effect at the time of the contract negotiations in this case.

In recent years Circular A-76 and amendments thereto have been published in the notice section of the Federal Register. The supplement to the current version of the Circular is not reprinted in the Federal Register because of its length. We are lodging with the Clerk of the Court and providing to counsel for respondents copies of the supplement.

[7] The President's Private Sector Survey on Cost Control (also known as the Grace Commission) has strongly endorsed the use of Circular A-76 to bring badly needed reform and cost savings to governmental operations. The Grace Commission has estimated that the federal government could save $7.39 billion over a three-year period by implementing the Circular aggressively. 10 Presi-

The Circular provides that it "does not establish, and shall not be construed to create, any substantive or procedural basis for any person to challenge any agency action or inaction on the basis that such action was not in accordance with this Circular," except as provided in the Circular itself. 44 Fed. Reg. 20558 (1979). See also 48 Fed. Reg. 37114 (1983). The Circular directs each agency to establish an appeals procedure that protects "the rights of all affected parties—Federal employees and their representative organizations, contractors and potential contractors, and contract employees and their representatives." 44 Fed. Reg. 20561 (1979). Under such procedures, a party directly affected by an initial agency contracting-out determination may file an objection; an impartial agency official at a level organizationally higher than the official who approved the original decision must rule on any objection within 30 days. The Circular provides that the decision on appeal is "final" and that the appeals "procedure and agency determinations may not be subject to negotiation, arbitration, or agreements." *Ibid.* [8]

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dent's Private Sector Survey on Cost Control, *Report on Management Office Selected Issues: Opportunities Beyond PPSSCC* 2-4 (1983). The Congressional Budget Office has estimated that in the long term savings from full implementation of the Circular on a government-wide basis would amount to $1.1 billion annually. 2 U.S. General Accounting Office, *Report of the Comptroller General: Compendium of GAO's Views on the Cost Saving Proposals of the Grace Commission* 230 (1985).

[8] At the time the appeals procedure was first included in Circular A-76, the Office of Management and Budget explained that it was designed to "promote more effective and consistent implementation" of the Circular and to "provide a level of visibility and discipline that should significantly enhance implementation." 44 Fed. Reg. 20557 (1979).

The appeals procedure provisions are now found in the supplement to Circular A-76 (at I-14 to I-15). Under the current procedures, a party directly affected by an agency decision to contract out may request detailed documentation supporting the agency's

2. The court of appeals' holding that the EEOC must bargain about compliance with Circular A-76 is plainly inconsistent with the Act.

a. Congress enacted the management rights provision of the Act, 5 U.S.C. 7106, "to preserve the essential prerogatives and flexibility Federal managers must have." H.R. Rep. 95-1403, 95th Cong., 2d Sess. 43-44 (1978). Section 7106(a) specifically provides that "nothing" in the Act shall affect "the authority of any management official of any agency * * * in accordance with applicable laws * * * to make determinations with respect to contracting out." On its face the provision renders nonnegotiable any bargaining proposal that would affect substantive agency decisions involving contracting out for goods and services. See H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 154 (1978) (Section 7106 "requires the agency to retain the right to make determinations with respect to contracting out work"). Since the union proposal at issue in this case requires management to comply with substantive policy guidelines for contracting-out determinations, it encroaches on a reserved management right and is nonnegotiable under Section 7106.

Moreover, bargaining about the union's proposal ultimately means that labor arbitrators, rather than federal agencies, may be making substantive contracting-out decisions. As we explained above (at page 4), if the Federal Service Impasses Panel orders inclusion of the union proposal at issue here as part of the collective bargaining agreement, the union may file grievances challenging management's determinations to contract out certain functions, by alleging some arguable violation of the detailed provisions of Circular A-76. If the

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cost comparison analysis; appeals must be filed within 15 working days of receipt of the documentation. As in the 1979 version of the Circular, a decision must be rendered within 30 calendar days of receipt of the appeal.

agency denies the grievance, the union may request arbitration. Review by the Authority of any arbitral award is not plenary. See 5 U.S.C. 7122. And it is unclear whether and to what extent the agency could obtain judicial review of an order of the Authority upholding an award against the agency. See page 23 note 20, *infra*.

The introduction of labor arbitrators into the contracting-out process inevitably would affect an agency's freedom to act. The grievance and arbitration procedure, followed by FLRA review, may last months or even years, thus delaying final resolution of the validity of a determination to contract out. See App., *infra*, 35a-36a. Moreover, since arbitrators normally are oriented toward compromise and solutions that will reduce labor-management friction, rather than precise interpretation of applicable provisions,[9] they may well disagree with management concerning application of Circular A-76. The problem is compounded by the fact that management necessarily uses discretion in applying the terms of the Circular. For instance, the Circular directs management to develop a "staffing estimate" of the annual productive hours necessary to accomplish an activity in-house as part of the cost analysis, but recognizes that there may be no way to make a precise estimate and that "informed judgment" is a "tool" to be used in the calculation. Supplement to OMB Circular A-76, at IV-7 (1983). As another example, management must retain in-house those commercial activities involving programs related to the direction of "national defense." 48 Fed. Reg. 37114 (1983); 44 Fed. Reg. 20558 (1979). Developing a staffing estimate or deciding whether an activity involves direction of the national defense may

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[9] See, *e.g.*, Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1487-1489, 1493-1507 (1959); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016-1024 (1955).

well involve exercise of the specialized expertise and discretion of agency managers. In view of the judgmental nature of such determinations, an arbitrator might well arrive at a different conclusion from that of the agency. Thus, while negotiation concerning agency compliance with Circular A-76 might appear at first glance to be harmless (as the court of appeals assumed), in fact it ultimately could deprive agencies of control over substantive contracting-out determinations.

b. The court of appeals concluded (App., *infra*, 8a-9a) that the union proposal would not interfere with an agency's right to make contracting-out determinations reserved under Section 7106 because the phrase "in accordance with applicable laws" in that section operates to limit the scope of reserved rights.[10] That is a misreading of the statutory language. The reference to "applicable laws" appeared in a comparable management rights provision at the inception of the original federal labor relations program created by executive order in 1962.[11] The President plainly could not have in-

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[10] The court of appeals also noted (App., *infra*, 8a) that procedures used in the exercise of management rights are negotiable under 5 U.S.C. 7106(b) and suggested (App., *infra*, 9a-10a n.12) that the union's proposal here was more procedural than substantive. The FLRA, however, did not find the proposal to be procedural in nature in the decision and order it rendered in this case, although in another, subsequent case it has referred to the proposal in this case and has characterized it as "only procedural in nature." *AFGE, Local 225 and Dep't of the Army*, 17 F.L.R.A. No. 66 (Apr. 5, 1985), slip op. 6. As we show in the text, the proposal imposes substantive criteria on management and ultimately could be read to permit arbitrators to second guess an agency's substantive contracting-out determinations. Thus, the proposal cannot be regarded as "procedural."

[11] The original management rights provision of the executive order program stated that "[m]anagement officials of the agency retain the right, in accordance with applicable laws and regulations," to exercise enumerated management rights. Exec. Order No. 10988, § 7(2), 3 C.F.R. 525 (1959-1963 comp.).

tended that language to provide a basis for limiting the exercise of management rights, particularly since there was no mechanism for binding arbitration in place in 1962.[12] The words "in accordance with applicable laws" are most naturally read as an indication that agencies were not to rely on the management rights provision as itself a source of legal authority for exercise of those rights, but were to base such activities on an independent source of authority.

It is most unlikely that Congress would have used the "applicable laws" language to create a private right of action through which unions could enforce the terms of internal management directives without express mention of such an intention. The court of appeals' reading of Section 7106 is particularly questionable in light of the fact that several courts of appeals have held that Circular A-76 and other contracting-out guidelines do not create rights that are enforceable by third parties. In *Local 2855, AFGE (AFL-CIO)* v. *United States*, 602 F.2d 574 (3d Cir. 1979), the court observed that the studies and evaluations on which a contracting-out decision "rested involved 'questions of judgment requiring close analysis and nice choices.' " *Id.* at 580-581 (quoting *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958)). The court therefore concluded that Circular A-76, as well as pertinent agency regulations governing contracting-out determinations, "fail[ed] to provide meaningful criteria against which a court may analyze the [agency's] decision" (602 F.2d at 581). See also *AFGE, Local 2017* v. *Brown*, 680 F.2d

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[12] See Study Committee Report and Recommendations, August 1969, *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 1240-1241 (Comm. Print 1979) [hereinafter cited as *Legislative History*].

722, 726-727 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983) (Army's determination to contract out was "an inappropriate subject for judicial review because the decision involves military and managerial choices inherently unsuitable for the judiciary to consider"). Since disputes concerning compliance with guidelines for contracting out are considered unsuitable for judicial review, there is no reason to think that Congress would have acted sub silentio to make such guidelines enforceable through labor arbitration. Cf. *Cort* v. *Ash*, 422 U.S. 66, 82-84 (1975).

The court of appeals was untroubled by the fact that the union proposal ultimately could result in arbitration of challenges to substantive agency contracting-out determinations, because, in the court's view, such challenges were subject to the statutory grievance and arbitration procedure even in the absence of a provision in the collective bargaining agreement requiring compliance with applicable laws and regulations (App., *infra*, 11a-16a). The court's reference was to the grievance procedure that may be invoked under the Act in the case of, inter alia, "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. 7103(a)(9)(C)(ii), 7121.

Even if the court of appeals had been correct in characterizing guidelines for contracting out as a "law, rule, or regulation affecting conditions of employment" within the meaning of 5 U.S.C. 7103(a)(9),[13] the man-

[13] Congress's reference to "any law, rule, or regulation affecting conditions of employment" in Section 7103(a)(9) should not be read to encompass guidelines for substantive decisions to shift agency operations to the private sector "purely for economic reasons." *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 686 (1982) (private employer's decision to terminate a part of its business was not part of the "terms and conditions of employment" as to which Congress mandated bargaining under the National Labor

agement rights provision would bar application of the statutory grievance and arbitration procedure to disputes concerning compliance with such guidelines. The explicit statement in Section 7106(a) that "nothing in this chapter" shall affect management's authority to make determinations with respect to contracting out constitutes an express limitation on the statutory grievance and arbitration procedure created by the Act.[14] As Judge MacKinnon noted in dissent, "[i]t is absurd to construe the act to say that '*nothing*' in the rest of Chapter 71 affects management's right, but that the rest of Chapter 71 *does* affect that right" (App., *infra*, 28a; emphasis in original). The majority's reading of Section 7106 would effectively nullify Congress's express reservation to management of the enumerated rights.

The court of appeals compounded its error in resting its analysis on the implicit assumption that OMB Circular A-76 qualifies as "applicable laws," within the meaning of Section 7106, or as "any law, rule, or regulation

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Relations Act). Judge MacKinnon correctly noted (App., *infra*, 29a-33a) that the term "conditions of employment" is defined under the Act as "personnel policies, practices, and matters * * * affecting working conditions" (5 U.S.C. 7103(a)(14)) and that the term "working conditions" generally has been defined narrowly.

[14] The Authority itself recently concluded that a union proposal that "would extend the coverage of the negotiated grievance procedure to the decision to contract out itself * * * [is] inconsistent with [5 U.S.C.] 7106(a)(2)(B)." *AFGE, Local 225 and Dep't of the Army*, slip op. 6.

Under the pre-Act federal labor relations program it was clear that employees could not grieve "matters otherwise excluded from the negotiations by [the management rights clause of Executive Order No. 11491]." Labor-Management Relations in the Federal Service: Report and Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491 (1975), *Legislative History* 1317. There is no indication that Congress meant to change that practice when it passed the Act in 1978.

* * *," within the meaning of Section 7103(a)(9). Circular A-76, like most OMB Circulars, is an executive management policy directive issued pursuant to delegated presidential budgetary and management authority. As an internal Executive Branch management directive, the Circular is interpreted and enforced internally, ultimately through the President's authority over appointed officials (see, *e.g.*, *Myers* v. *United States*, 272 U.S. 52, 163-164 (1926)). The court of appeals' reading of the statutory terms apparently would make arbitrators—rather than the President himself—the final arbiters of whether agencies have adhered adequately to the President's management policy directives. The result would be to transform a tool of presidential management authority into an occasion for interference by outsiders into that management process. At least in the absence of some explicit statement to the contrary in the legislative history, there is no reason to believe that Congress, in using the statutory terms construed by the court of appeals, intended to encroach on the President's authority in this manner. Compare, *e.g.*, *AFGE, AFL-CIO* v. *Carmen*, 669 F.2d 815, 822-826 (D.C. Cir. 1981).

c. The union's proposal is nonnegotiable for the additional reason that it is inconsistent with the exclusive appeals procedure prescribed by the Circular. Under the Act, 5 U.S.C. 7117(a)(1), the duty to bargain in good faith exists only "to the extent not inconsistent with any Federal law or any Government-wide rule or regulation;" it does not extend to "matters which are the subject of any * * * Government-wide rule or regulation." Congress intended that Circular A-76, while not a "rule" or "regulation" within the meaning of 5 U.S.C. 7103(a)(9) (see pages 17-19, *supra*), be treated as a "Government-wide rule or regulation" within the

specialized meaning of Section 7117(a)(1).[15] The union's proposal conflicts with the express provisions of the Circular (see page 12, *supra*) that its appeals procedures are to be exclusive; that agency contracting-out determinations are not to be subject to negotiation, arbitration, or agreement; and that agency decisions pursuant to the appeals procedure of the Circular shall be final. The lengthy grievance and arbitration procedures that would be introduced as a result of the union's proposal would render pointless the Circular provisions requiring expedited resolution of contracting-out disputes.[16] And if the grievance and arbitration procedures of the Act may override the appeals procedure prescribed by the Circular, contractors and their employees would no longer be represented in connection

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[15] Although executive management policy directives do not constitute "rules" or "regulations" within the ordinary meaning of those terms, the legislative history of the Act makes clear that Congress intended the phrase "Government-wide rule or regulation" to include such policy directives for the limited purposes of Section 7117. See H.R. Conf. Rep. 95-1717, *supra*, at 158 (term "rules or regulations" used in Section 7117 is to be interpreted as including "official declarations of policy of an agency which are binding on officials and agencies to which they apply"). See also *AFGE, Local 225 and Dep't of the Army*, slip op. 4 (Circular A-76 constitutes a "Government-wide rule or regulation" within the meaning of Section 7117(a)(1)); *National Federation of Federal Employees and Dep't of the Air Force, Lowry Air Force Base*, 9 F.L.R.A. 151, 154 (1982) (Congress intended that the term "Government-wide rule or regulation" used in Section 7117(a)(1) "not be confined only to those rules or regulations which meet formal requirements for notice and comment"). Congress presumably wished to make certain that the collective bargaining process would not interfere with government-wide directives, regardless of their nature.

[16] The short deadlines established by the Circular are critical to the contracting-out process, because data must be current in order for cost comparisons to be valid and because contractors normally are expected to adhere to a firm bid.

with the ultimate resolution of any dispute. See page 12, *supra*.[17]

The court of appeals disregarded these inconsistencies between the union proposal and the terms of Circular A-76, on the ground that "the Circular's restrictive language cannot be construed to limit the statutory right to file grievances asserting a violation of contracting-out regulations" (App., *infra*, 16a). But the whole point of Section 7117 is that a "Government-wide rule or regulation" *does* limit the scope of rights under the Act. Section 7117 expresses Congress's intention that agencies not be required to bargain about proposals that, if incorporated into the collective bargaining agreement, would be inconsistent with a government-wide directive like Circular A-76. See H.R. Conf. Rep. 95-7117, *supra*, at 155 (Section 7117 "authorizes * * * the issuance of governmentwide rules or regulations which may restrict the scope of collective bargaining which might otherwise be permissible under the provisions of this title"). Since bargaining about the union proposal in this case ultimately would introduce a form of third-party review that would be inconsistent with the terms of the Circular, Section 7117 precludes such bargaining.[18]

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[17] Under the system authorized by the decision below, the arbitrator apparently may reach a result different from that of the agency appeals procedure prescribed by the Circular. It is unclear from the decision what weight (if any) is to be given to the latter result, which normally would be available long before any arbitral proceeding was resolved.

[18] In the case of a similar conflict between the grievance procedures authorized by the Act and exclusive appeal procedures prescribed by the National Guard Technicians Act of 1968, the courts of appeals have uniformly held that the former must yield to the latter. See *Indiana Air National Guard* v. *FLRA*, 712 F.2d 1187 (7th Cir. 1983); *State of Nebraska, Military Dep't* v. *FLRA*, 705 F.2d 945 (8th Cir. 1983); *California National Guard* v. *FLRA*, 697 F.2d 874 (9th Cir. 1983); *New Jersey Air National Guard* v.

3. We recognize that there is currently no conflict among the circuits on the question presented by this petition. However, we view the decision below as of special importance to the federal government, both because of its potential threat to the integrity of the rights reserved to management under the Act and because of the precedent it appears to create for interference with the President's ability to manage the Executive Branch through written policy directives. The decision also is of concern because of the magnitude of its potential financial impact. Indeed, there is already evidence of that impact; arbitrators in several cases have ordered the rescission of agency contracting-out determinations that were alleged by unions to have violated some part of Circular A-76 or related guidelines and have awarded back pay against the agencies.[19]

FLRA, 677 F.2d 276 (3d Cir.), cert. denied, 459 U.S. 988 (1982). The National Guard Technicians Act of 1968, 32 U.S.C. 709(e)(5), provides that "[n]otwithstanding any other provision of law * * * * a right of appeal which may exist with respect to [an adverse action] shall not extend beyond the adjutant general of the jurisdiction concerned." The courts have reasoned that union proposals calling for a negotiated grievance procedure in connection with adverse actions affecting National Guard technicians were not negotiable, "since the Labor-Management Act itself provides that an agency's duty to bargain in good faith exists 'to the extent not inconsistent with any Federal law.' " *California National Guard* v. *FLRA*, 697 F.2d at 879 (quoting 5 U.S.C. 7117(a)(1)).

[19] In one case, the Navy estimates that it may be required to expend approximately $400,000 in back pay as a result of an arbitrator's order to terminate a contract and to reinstate displaced employees with full back pay and fringe benefits. See *Naval Air Station, Whiting Field, and AFGE, Local Union No. 1954*, FMCS No. 83K/06143 (Apr. 29, 1983). See also *Dep't of the Army, Oakland Army Base, and AFGE, Local 1157*, FMCS No. 83K/24072 (Nov. 26, 1984) (directing termination of contract, reinstatement of displaced employees, and back pay from date of termination to date of reinstatement); *U.S. Army Communications Command, Fort McClellan, and Local No. 1941, AFGE*, FMCS No. 83K/00570 (Aug. 9, 1983) (ordering agency to cease and

Moreover, there is some uncertainty whether the government will be able to obtain review of future arbitral awards entered on the authority of the decision below.[20] We therefore believe that review by this Court is warranted at this time.

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desist from contracting out telephone services and implementing reduction in force pending proper notification to union and to reinstate any displaced employees); *U.S. Army Communications Command Agency—Redstone Arsenal, and AFGE, Local 1858*, FMCS No. 83K/05094 (May 16, 1983) (contract must be cancelled until agency complies with arbitrator's interpretation of collective bargaining agreement provisions involving provision of documents to union); *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, and AFGE, Local No. 2840*, FMCS No. 82K/20840 (Aug. 9, 1982) (ordering cancellation of procurement action). Exceptions to these awards have been filed with the FLRA, but the Authority has not yet ruled on any of the exceptions.

We are lodging with the Clerk of the Court and providing to counsel for respondents copies of the cited arbitral decisions.

[20] Under 5 U.S.C. 7123(a), not all orders of the Authority on exceptions to arbitral awards are reviewable. The decision of the Ninth Circuit in *United States Marshals Service* v. *FLRA*, 708 F.2d 1417 (1983), has created uncertainty about the extent to which an agency may obtain judicial review of the Authority's order affirming an arbitral award alleged to infringe on a reserved management right. See *Andrade* v. *Lauer*, 729 F.2d 1475, 1485 & n.16 (D.C. Cir. 1984); App., *infra*, 35a-36a n.17. If further judicial review of this issue were foreclosed, a conflict among the circuits could never arise.

A case involving the negotiability of a bargaining proposal that would require correction of in-house estimates that are not prepared in accordance with existing contracting-out directives is currently pending in the Ninth Circuit. *Defense Language Institute* v. *FLRA*, Nos. 84-7498 and 84-7610 (argued Mar. 11, 1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1985

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2310

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

V.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ETC., INTERVENOR

Petition for Review and Cross-Application for Enforcement of an Order of the Federal Labor Relations Authority

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Argued October 26, 1983
Decided September 21, 1984

Before WRIGHT and TAMM, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* TAMM.

Dissenting opinion filed by *Senior Circuit Judge* MACKINNON.

TAMM, *Circuit Judge*: This is an appeal from a decision of the Federal Labor Relations Authority (the Authority) ordering petitioner Equal Employment Opportunity Commission (EEOC) to bargain over a union contract proposal that requires compliance with applicable laws and regulations regarding "contracting-out." EEOC contends that it has no duty to bargain because the proposal concerns a subject exclusively reserved to management. The Authority has cross-petitioned for

enforcement. For the reasons stated below, we enforce the Authority's order.

I. BACKGROUND

A. *Statutory Framework*

Title VII of the Civil Service Reform Act of 1978 (the Act), 5 U.S.C. §§ 7101-7135 (1982), substantially revised labor-management relations in the federal sector. The Act was designed to balance the right of federal employees to engage in concerted activity with the need of federal managers to achieve an "effective and efficient [federal] Government." 5 U.S.C. § 7101(b). To administer the Act and establish labor-management relations policy, Congress created the Federal Labor Relations Authority. The Authority's responsibilities include resolving issues relating to the duty to bargain.

The Act established a system of collective bargaining that requires federal agencies and employee unions to bargain in good faith "with respect to . . . conditions of employment." 5 U.S.C. § 7103(12). The term "conditions of employment" is expansively defined in the Act as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(14).

This broad duty to bargain is subject to certain limitations. Specifically, the Act contains a management rights clause that reserves certain prerogatives to management. 5 U.S.C. § 7106(a). Most important, for this case, the management rights clause reserves to management the authority "to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B). The procedures used in exercising these reserved management rights are subject to negotiation. 5 U.S.C. § 7106(b).[1]

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[1] Section 7106 provides in pertinent part:

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
>
> . . . .

B. *The Facts*

The facts in this case are undisputed. During contract negotiations with the EEOC, the union[2] advanced the following proposal:

> "The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting-out."[3]

Joint Appendix (J.A.) at 2. EEOC declared the proposal nonnegotiable and refused to bargain over it. To

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(2) in accordance with applicable laws—

. . . .

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

. . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

. . . .

(2) procedures which management officials of the agency will observe in exercising any authority under this section;

. . . .

5 U.S.C. §§ 7106(a)(2)(B), (b)(2).

[2] The union, intervenor in this appeal, is the American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals.

[3] OMB Circular A-76 (the Circular) prescribes guidelines for determining whether the goods and services needed by the federal government should be acquired from the private sector or obtained "in-house" with government facilities and personnel. Joint Appendix (J.A.) at 37. The Circular specifies that the government generally should acquire its goods and services from private enterprise if it is cost-effective. The Circular contains a Cost Comparison Handbook outlining procedures to be followed in determining whether contracting-out is most cost-effective. Since the petition in this case was filed, OMB Circular A-76 has been revised. The revision in no way affects the issues before us.

resolve the dispute, the union filed a petition for review with the Authority. J.A. at 1.[4]

EEOC argued before the Authority that the union proposal was nonnegotiable primarily for two reasons.[5] First, it contended that the proposal conflicted with the Act's express reservation to management of the right "to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B). Second, the EEOC argued that OMB Circular A-76 (the Circular) itself prohibited negotiation over the proposal.[6] J.A. at 12-13.

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[4] 5 U.S.C. § 7105(a)(2)(E) provides that the authority shall "resolve[] issues relating to the duty to bargain." The Act further provides that "if an agency involved in collective bargaining . . . alleges that the duty to bargain in good faith does not extend to any matter, the [union] may appeal the allegation to the Authority." 5 U.S.C. § 7117(c)(1). The Authority is required to issue a written decision containing reasons for its determination. If the Authority concludes that the disputed issue is within the scope of the duty to bargain, it orders the agency to bargain in good faith. The Authority does not, however, address the merits of the proposal. See Library of Congress v. FLRA, 699 F.2d 1280, 1284 (D.C. Cir. 1983).

If a proposal is determined to be within the duty to bargain, the parties must negotiate, although they may adhere to a particular position to the point of impasse. If an impasse is reached, the parties may refer the dispute to the Federal Service Impasses Panel. 5 U.S.C. §§ 7119(b), (c).

[5] In addition to the two arguments noted here, the agency also asserted that the proposal fell outside the scope of the duty to bargain because it involved matters that do not directly affect conditions of employment. The FLRA's decision did not address this contention. American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA 3 (1982). Since the EEOC did not raise this argument in its petition to this court, we will not discuss the issue.

[6] The Circular provides that its text "shall not be construed to create[] any substantive or procedural basis for any person to challenge any agency action or inaction on the basis that such action was not in accordance with [this] Circular, except as specifically set forth in [this Circular]." J.A. at 37. The Circular further di-

On September 2, 1982, the Authority issued a decision holding that the union proposal was a mandatory subject of bargaining. *American Federation of Government Employees, AFL-CIO National Council of EEOC Locals and Equal Employment Commission*, 10 FLRA 3 (1982). The Authority concluded that the proposal did not impair EEOC's statutory right to make contracting-out decisions because it recognized only existing limitations on EEOC's power. By its terms, ruled the Authority, the proposal established no substantive limitations on management discretion. *Id.*

The Authority further concluded that the proposal was not rendered nonnegotiable by the terms of the Circular. EEOC apparently asserted that adoption of the proposal would result in subjecting all contracting-out disputes to the negotiated grievance procedure, thus conflicting with the Circular's intent to allow EEOC to resolve such disputes internally.[7] The Authority rejected EEOC's underlying assumption that contracting-out disputes are not grievable in the absence of the proposed contract language. 10 FLRA at 4-5. Rather, the Authority found that such disputes were already grievable under section 7121 of the Act and that the Circular alone could not limit the *statutorily* prescribed scope of the grievance proce-

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rects agencies to develop procedures for an informal review of determinations made pursuant to its provisions and states that those procedures and agency determinations are not subject to negotiation or arbitration. J.A. at 50.

[7] This argument is not expressly articulated in the EEOC's statement of position before the Authority. We therefore rely on the Authority's characterization of the agency's position. *See* American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission, 10 FLRA at 4-5 (1982).

dure.[8] 10 FLRA at 4-5. Concluding that the contract proposal was not prohibited by either the Act or the Circular, the Authority ordered EEOC to bargain. *Id.* at 5.

EEOC filed a timely petition for review in this court.[9] The FLRA filed a cross-petition for enforcement. We have jurisdiction pursuant to 5 U.S.C. § 7123.[10]

II. STANDARD OF REVIEW

The Act provides that the Authority's rulings are reviewable in accordance with section 10(e) of the Administrative Procedure Act (APA), 5 U.S.C. § 706 (1982). *See* 5 U.S.C. § 7123(c) (1982). The Authority's determinations will thus be upheld "if they are supported by substantial evidence[,] . . . are not arbitrary, capricious, or an abuse of discretion[,] and are otherwise in accordance with law." *National Treasury Employees Union v. FLRA*, 721 F.2d 1402, 1405 (D.C. Cir. 1983). Review is further circumscribed where, as here, the Authority has construed its enabling legislation. Indeed, the Au-

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[8] 5 U.S.C. § 7121(a) requires all collective bargaining agreements to include a system for settling grievances. The negotiated grievance procedure must provide for binding arbitration for grievances not settled through the procedure. 5 U.S.C. § 7121(b)(3)(C). "Grievance" is broadly defined in the Act as any complaint concerning employment, the terms of a collective agreement, or the interpretation of any law, rule or regulation affecting conditions of employment. 5 U.S.C. § 7103(a)(9).

[9] EEOC filed a request for reconsideration with the Authority on September 16, 1982. J.A. at 64. On March 18, 1983, the Authority issued an order denying the EEOC's request. Brief for Federal Labor Relations Authority at C-1.

[10] 5 U.S.C. § 7123(a) provides that "[a]ny person aggrieved by any final order of the Authority . . . may . . . institute an action for judicial review of the Authority's order . . . in the United States Court of Appeals for the District of Columbia." The Authority may petition any appropriate United States court of appeals for enforcement of any of its orders. 5 U.S.C. § 7123(b).

thority is entitled to "considerable deference" when interpreting and applying the Act's provisions to specific situations. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 104 S. Ct. 439, 444 (1983). Accordingly, we will uphold the Authority's interpretation of the Act if it is "reasonably defensible," *Department of Defense v. FLRA*, 659 F.2d 1140, 1162 n.121 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 104 S. Ct. at 444 (1983), and not inconsistent with any congressional mandate or policy.[11]

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[11] The dissent contends that the Act's reservation to management of the right to contract-out is a limitation on the Authority's power to direct labor-management relations. Consequently, argues the dissent, the Authority's interpretation of the scope of management's reserved rights is not entitled to great deference. The dissent ignores the fact that the dispute here concerns the negotiability of a specific proposal. Congress has expressly entrusted to the Authority the power and the obligation to resolve all such disputes. *See supra* note 4. Decisions in this circuit have uniformly recognized that the Authority, and not the court, must exercise the judgment necessary to determine whether a proposal that allegedly violates management's rights is bargainable. "[T]he distinction between proposals encroaching on management's nonnegotiable substantive authority and those concerning properly negotiable procedural matters [is] primarily to be made by the Authority in an exertion of its expertise . . . ." National Treasury Employees Union v. FLRA, 691 F.2d 553, 561 (D.C. Cir. 1982) (footnote omitted) (citing Department of Defense v. FLRA, 659 F.2d 1140, 1161 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982)).

The dissent's reliance on Vanguard Interstate Tours, Inc. v. ICC, 735 F.2d 591 (D.C. Cir. 1984), is misplaced. In the statute at issue in *Vanguard*, Congress expressly limited the discretion previously granted to the ICC and set out the precise criteria governing the issue in the case. Here, in contrast, Congress has expressly delegated to the Authority the task of resolving issues relating to the duty to bargain. We therefore conclude that even if the management rights clause acts as a limitation on the power of the Authority, the Authority's exercise of its expertise primarily to determine whether an issue in a particular case is negotiable is entitled to deference.

III. ANALYSIS

EEOC asserts that the Authority improperly construed the terms of the management rights clause, as well as the probable effect of the disputed proposal. EEOC suggests first that the plain text of the management rights clause insulates from collective bargaining *all* proposals regarding contracting-out. Second, EEOC contends that the proposal is nonnegotiable because its adoption would subject contracting-out decisions to the statutorily prescribed grievance procedure, thus infringing on EEOC's reserved authority to make contracting-out decisions. Finally, EEOC argues that the proposal is inconsistent with the Circular.

A.

EEOC asserts that the management rights clause gives management unfettered authority to make contracting-out determinations. Apparently assuming that any proposal regarding contracting-out will restrict this authority, EEOC suggests that the management rights clause renders nonnegotiable *all* proposals regarding contracting-out.

EEOC's argument is untenable in light of the plain text of the clause. The management rights clause provides that "nothing in [Title VII] shall affect the authority of any management official of any agency—. . . in accordance with applicable laws—. . . to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B). This language plainly restricts the authority reserved to management by requiring that it be exercised "in accordance with applicable laws." In addition, section 7106(b) provides that procedures used to exercise rights are negotiable. *See supra* note 1. Because the Act does not grant to management unqualified authority to contract-out, union proposals touching upon that authority are not automatically rendered nonnegotiable. Rather, management may refuse to bar-

gain over only those proposals that would expand upon the restrictions contained in the Act. *See infra* note 12.

The union proposal here suggests contract language that essentially echoes the statutory requirement that contracting-out determinations be made in accordance with applicable laws. Any restriction imposed by the proposal on management's contracting-out authority thus stems from the Act's mandate. EEOC, of course, must comply with these requirements regardless of whether the proposal is adopted as part of the collective agreement. The union proposal at issue here thus does not of itself establish any substantive criteria guiding management's contracting-out determinations. We therefore agree with the Authority's conclusion that the proposal does not affect management's reserved authority, within the meaning of the statutory language, to make contracting-out decisions.[12]

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[12] The precise scope of management's reserved authority is difficult to define. In previous rulings, the Authority has effectively defined the protection accorded management by classifying proposals as either negotiable procedures under section 7106(b) or nonnegotiable substantive rights. To distinguish between the two, the Authority has developed a "direct interference" test. Under this test, a proposal involves a nonnegotiable substantive right if it would "directly interfere" with management's ability to make the relevant determination. We have repeatedly affirmed the Authority's use of this test. *See* Department of Defense v. FLRA, 659 F.2d 1140, 1159 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). Although in the present case the Authority did not expressly classify the proposal as procedural and did not explicitly apply the direct interference test, the analysis used was quite similar. In concluding that the proposal was negotiable, the Authority focused on the agency's retention of the full degree of discretion that exists in the absence of the proposal. We find this analysis fully acceptable as a guideline to determine the scope of substantive rights reserved to management.

The dissent misconstrues both the direct interference test and the import of our conclusion here. The direct interference test is essentially definitional. It determines whether a particular pro-

EEOC points to no expression of intent in the legislative history that contradicts this conclusion. Though far from conclusive, the legislative history indicates that the management rights clause should not be interpreted to negate the Act's broad duty to bargain. In adopting the management rights clause, Congress sought to reserve to management the authority necessary to achieve an effective and efficient government. At the same time, however, Congress intended to broaden the scope of bargaining beyond that sanctioned under the previous labor-management relations system.[13] Thus, as one member explained, the clause was designed to protect "genuine managerial prerogatives."[14] Indeed, Congress directed that the clause was to "be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal."[15]

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posal is in fact substantive and therefore nonnegotiable. Although the Authority did not expressly apply this test here, it did use the same functional analysis: only proposals that limit substantively management's contracting-out determinations involve nonnegotiable rights. Implicit in the Authority's opinion is the conclusion that the disputed proposal represents more of a procedural than a substantive limitation on management's right to contract-out.

[13] H.R. REP. NO. 1403, 95th Cong., 2d Sess. 43 (1978), *reprinted in* House of Representatives Committee on Post Office and Civil Service, 96th Cong., 1st Sess. Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 [hereinafter cited as Legislative History] at 689 (1979); *see* National Treasury Employees Union v. FLRA, 691 F.2d 553, 559 (D.C. Cir. 1982).

[14] 124 CONG. REC. 29,199 (1978) (remarks of Rep. Ford), *reprinted in* Legislative History at 956.

[15] H.R. REP. NO. 1403, 95th Cong., 2d Sess. 44 (1978), *reprinted in* Legislative History at 690. The management rights clause that appears in the Act was adopted as an amendment on the House floor to the clause reported by the House Committee on Post Office and Civil Service. This amendment, however, did not change the purpose behind the clause as explained in the report accompanying the Committee version of the bill. "This substitute

In sum, neither the text nor the legislative history mandates a conclusion other than that reached by the Authority. We cannot say, therefore, that the Authority acted arbitrarily in concluding that the proposal does not affect EEOC's reserved rights. We reject EEOC's argument that the management rights clause renders the proposal nonnegotiable.

B.

EEOC argues that even if the text of the proposal does not impose additional restrictions, its adoption would effectively hinder EEOC's ability to make contracting-out decisions. Specifically, EEOC contends that the proposal would invade its reserved management rights by making compliance with the Circular a contractual prerequisite of any decision regarding contracting-out. The union could then challenge EEOC's decisions to contract-out by alleging that EEOC violated the collective agreement in failing to comply with appropriate procedures. Any contracting-out decision would then be subject to grievance procedures and ultimately to arbitral review. According to EEOC, contracting-out decisions could thus become the prerogative not of management, but of the arbitrator. In this way, EEOC implies, the union would be able to achieve precisely what the management rights clause was intended to prevent.

EEOC's argument assumes that a complaint asserting that a contracting-out determination was not

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[the amendment that was adopted on the floor] strengthens the 'Management rights' section reported by the Committee, but it is still to be treated narrowly as an exception to the general obligation to bargain over conditions of employment." 124 CONG. REC. 29,183 (1978), *reprinted in* Legislative History at 924. The amendment adopted on the House floor was adopted by the House-Senate Conference Committee without change. H.R. REP. NO. 1717, 95th Cong., 2d Sess. 153-54 (1978) (Conference Report), *reprinted in* Legislative History at 821-22.

made in accordance with applicable laws, including the Circular, would not be grievable in the absence of the contract proposal. This assumption, however, is contrary to the text of the Act.

The Act expansively defines the subjects covered under the statutory grievance procedure. Grievances include complaints concerning "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment" as well as complaints "concerning any matter relating to the employment of the employee." 5 U.S.C. § 7103(a)(9).[16] Only five subjects, not including the subject of contracting-out, are expressly excluded from coverage under the grievance mechanism.[17] An allegation that the EEOC failed to comply with the OMB Circular, or

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[16] 5 U.S.C. § 7103(a) (9) provides in full:

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

[17] The [sections requiring a grievance procedure] shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

5 U.S.C. § 7121(c)

with any other law or rule governing contracting-out, plainly falls within this expansive definition.[18]

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[18] The dissent contends that a complaint asserting a failure to comply with the Circular does not fall within the statutory definition of grievance. Because the Act defines grievance to include claims alleging violations of regulations "affecting conditions of employment," and because "conditions of employment" is in turn defined as "matters affecting working conditions," the dissent maintains that grievances are restricted to claims involving surroundings and hazards.

The dissent's narrow definition of "working conditions" does not apply in the context of this Act. The definition of working conditions as hazards and surroundings derives from Corning Glass Works v. Brennan, 417 U.S. 188, 201-03 (1974), a case construing the language of the Equal Pay Act. The Court in *Corning Glass Works* based its definition of the term "working conditions" on Congress's intent as expressed in an extensive discussion of the term in the legislative history of the Equal Pay Act. The Court noted that "working conditions" has a generally accepted meaning in the "specialized language of job evaluation systems." 417 U.S. at 202. A definition adopted in the context of a specific statute and in light of a detailed legislative history, however, is not immediately transferable to this case. *See* Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595, 600 n.7 (D.C. Cir. 1981). The legislative history of Title VII nowhere indicates that Congress intended such a restriction on the rights granted employees. Indeed, the Authority has consistently adopted, with this court's sanction, a *broad interpretation* of the phrase "conditions of employment." *See* Department of Defense v. FLRA, 685 F.2d 641, 647-48 & n.3 (D.C. Cir. 1982); National Treasury Employees Union and Internal Revenue Service, 3 FLRA No. 112 at 693, 695 (1980) (conditions of employment concerns working situation and employment relations of bargaining unit employee). Moreover, as the dissent itself notes, the term "conditions of employment" includes personnel policies and practices as well as matters affecting working conditions. *See* Dissent at n.12. Even if the phrase "matters affecting working conditions" comprises only hazards and surroundings, contracting-out decisions, which ultimately may result in a layoff, undoubtedly fall under the umbrella of personnel policies or practices.

In addition, we note that the dissent's restrictive definition applies only to grievances defined in section 7103(a)(9)(C)(ii) as violations of regulations affecting conditions of employment. The dissent's analysis, of course, does not apply to grievances defined in

EEOC maintains, however, that in addition to the five subjects expressly designated in section 7121 of the Act, all prerogatives reserved to management under the management rights clause are excluded from the scope of matters grievable. EEOC asserts that because the management rights clause provides that "*nothing in this chapter* shall affect" management's authority to contract-out, such decisions are removed from grievance procedures. 5 U.S.C. § 7106(a) (emphasis added). A grievance alleging noncompliance with the Circular, however, does not affect management's substantive authority, within the meaning of the statutory language, to contract-out. Rather, it provides a procedure for enforcing the Act's requirement that contracting-out decisions be made in accordance with applicable laws.[19] Any substantive limitation on management's authority stems from the externally established criteria contained in the Circular. *See supra* text accompanying note 12. We therefore find that a grievance asserting that management failed to comply with its statutory or regulatory parameters in making a contracting-out decision is not precluded by the management rights clause.[20]

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sections 7103(a)(9)(A) or (B) as any matter relating to the employment of an employee. A claim that work was improperly contracted out surely falls within this definition of grievance.

[19] The dissent maintains that grievances alleging a failure to comply with applicable laws regarding contracting-out will affect management by delaying implementation of a decision. Of course, any review of an agency decision, whether conducted by the courts or through a contractual grievance mechanism, may cause some delay. This court has previously recognized that a proposal that may result in delay, including delay created by the arbitral process, need not infringe management's reserved authority, and may thus be negotiable. *See* Department of Defense v. FLRA, 659 F.2d at 1153-58.

[20] Our reading of the text of the Act is supported by the legislative history. Congress unambiguously stated that the management rights clause, at least in one instance, does not affect an employee's right to enforce the Act's requirement that management exer-

The statutorily defined grievance procedure therefore encompasses a claim that a contracting-out determination was not made in accordance with law. EEOC's initial assumption that including the proposal in the collective bargaining agreement would expose for the first time EEOC's contracting-out determinations to employee grievance challenges, and arbitral review, is contradicted by the plain text of the Act. We thus conclude that adoption of the proposal in no way expands an employee's right to challenge management's contracting-out decisions under the grievance proce-

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cise its reserved right in accordance with applicable laws and regulations.

> [M]anagement has the reserved right to make the final decision to "remove" an employee, but that decision must be made in accordance with applicable laws and procedures, and the provisions of any applicable collective bargaining agreement. The reserved management rights to "remove" would in no way affect the employee's right to appeal the decision through statutory procedures or, if applicable, through the procedures set forth in a collective bargaining agreement.

124 CONG. REC. 29,183 (1978), *reprinted in* Legislative History at 924. Similarly, we believe that EEOC's reserved right to make determinations regarding contracting-out does not insulate EEOC from challenges, through the grievance mechanism, asserting violations of applicable laws or regulations. *Cf.* National Treasury Employees Union v. FLRA, 691 F.2d 553, 564-65 (D.C. Cir. 1982) (noting that although establishment of performance standards is encompassed within management's reserved rights, employees may challenge those standards in grievance proceedings).

The dissent suggests that this conclusion requires us to construe the statutory grievance mechanism as an applicable law with which management must comply. This construction, suggests the dissent, does not comport with the statutory language which states that "nothing in Title VII shall affect" management's authority to make determinations regarding contracting-out. We do not determine here whether the section 7121 grievance mechanism is an "applicable law." Rather, we conclude only that a grievance alleging that management has not complied with externally established criteria does not affect management's reserved substantive authority.

dure.[21] Accordingly, we reject EEOC's contention that the proposal will impair its management rights by making compliance with the Circular a contractual prerequisite of contracting-out decisions.

C.

Finally, EEOC argues that the language of the OMB Circular renders the proposal nonnegotiable. As noted, the Circular states that its provisions "shall not be construed to create" any right of appeal except as provided in the Circular itself. J.A. at 37. EEOC maintains that the Authority's ruling that the proposal is negotiable conflicts with the Circular's limiting language because it allows alternative enforcement actions through the grievance mechanism. Two considerations compel us to reject this argument.

First, the proposal is not inconsistent with the Circular's limiting language. The proposal does not "create" any new right of appeal. Rather, as we have already determined, the right to file grievances regarding contracting-out decisions is created by the Act.

Second, and more important, the Circular's restrictive language cannot be construed to limit the statutory right to file grievances asserting a violation of contracting-out regulations. There is no indication in the Act or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure. To allow the text of the Circular to restrict the scope of grievances would place "limitations in the statute not placed there by Congress." *Colgate-Palmolive Peet Co. v. NLRB*, 338 U.S. 355,

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[21] The scope of the grievance procedure can of course be limited in negotiation. We address here only the *statutorily* defined grievance procedure.

363 (1949). Accordingly, we reject EEOC's argument that the Circular bars negotiation over the proposal.[22]

IV. CONCLUSION

For the reasons stated herein, we conclude that the Authority's interpretation should be upheld and that its order should be enforced.

Judgment accordingly.

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[22] EEOC also argues that section 7117(a)(1) of the Act, which prohibits bargaining over matters that are inconsistent with other laws, limits the matters subject to grievance procedures. 5 U.S.C. § 7117(a)(1). EEOC asserts that bargaining over contracting-out is inconsistent with the management rights clause and therefore contracting-out determinations are excluded from the grievance mechanism. Reply Brief for Petitioner at 5. EEOC's assertion that the proposal at issue in this case is inconsistent with other law is derivative in nature. EEOC contends the proposal is inconsistent with the management rights clause. We have already stated, however, that the management rights clause does not, on its face, render this proposal nonnegotiable. The proposal cannot be "inconsistent with other law" if it is not inconsistent with the management rights clause.

MACKINNON, *Senior Circuit Judge*, dissenting: Because I believe that the majority opinion seriously misreads the statute which controls this case, I consider it my duty to dissent. The opinion of the majority holds that the EEOC must bargain over a proposal which, under the Federal Labor Relations Authority's (FLRA's) interpretation of the statute, is a total nullity. The majority holds that incorporation into the collective bargaining agreement of a promise to comply with applicable regulations, including OMB Circular A-76, does require that all "contracting-out" decisions be subject to grievance determinations, but that such a provision affects neither management's authority to contract out nor the existing union remedies for violations of that regulation.[1]

The FLRA essentially held that (1) management has a right to make determinations regarding contracting out; (2) such determinations must be made in accordance with applicable regulations; (3) violations of such regulations are *already grievable* under the Civil Service Reform Act of 1978 without regard to the necessity of making them grievable in a collective bargaining agreement; and thus (4) a provision in a collective bargaining agreement requiring adherence to such regulations does not infringe the agency's specific, existing right to "contract out" because it does not make nongrievable matters grievable. The essential flaw in the

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[1] The FLRA has previously held that a proposal which purported to bind an agency to the specific terms of Circular A-76 as of the date of the proposal—thus, in effect, prohibiting the government from subsequently changing the regulation—was nonnegotiable. *See* National Federation of Federal Employees, Local 1167, 6 F.L.R.A. 574, 577 (1981). In the instant case, the language at issue ("The [agency] agrees to comply with OMB Circular A-76") can also be read, like that in *Local 1167*, to require compliance with the *present* terms of the Circular. The FLRA, however, apparently has interpreted the proposal only to require the agency to comply with the Circular as it is amended from time to time.

FLRA's reasoning—and the one adopted by the majority—is that, contrary to its assertion, violations of Circular A-76 and other regulations regarding *substantive* contracting-out decisions are *not* statutorily grievable. Hence, inclusion in a collective bargaining agreement of a promise to comply with the Circular's terms would permit the union to seek arbitration on issues that are *not* now grievable, and would create arbitral review of determinations specifically entrusted by Congress to the EEOC and all other federal agencies. This far-reaching decision potentially affects *every* non-exempt federal agency.

The union plainly recognizes this; why else does it seek so strenuously to impose a collective bargaining provision that—the majority implicitly asserts—gives it nothing it did not already possess? Far from being a nullity, the decision of the majority seriously infringes on the authority, specifically reserved to the EEOC and all other agencies by Congress, "to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(E).

I. STANDARD OF REVIEW

The majority recognizes that "[r]eview of the Authority's order shall be on the record in accordance with [5 U.S.C. § 706]." 5 U.S.C. § 7123(c). Section 706 provides.

> The reviewing court shall—
>
> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law;* [or]
>
> . . .
>
> (C) *in excess of statutory jurisdiction, authority, or limitations, or short of statutory right* . . . .

(Emphasis added.) Thus, the standard of review for FLRA decisions was spelled out recently by Justice Brennan in *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 104 S. Ct. 439, 444 (1983):

> Like the National Labor Relations Board, ... the FLRA was intended to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the Act.... Consequently, the Authority is entitled to considerable deference when it exercises its "special function of applying the general provisions of the Act to the complexities" of federal labor relations....
>
> On the other hand, the "deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." ... Accordingly, *while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, ... they must not "rubber stamp ... administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."*

(Emphasis added.) Applying this standard, the Court unanimously reversed the FLRA's own construction of its enabling statute. The same principle calls for reversal here.

Courts should be especially cautious about giving undue deference to agency construction of enabling legislation when the particular provision being construed is one designed to act as a *limitation* on the agency. As this court recently pointed out,

> When Congress' intent is to delegate to the agency the task of supplying the meaning of the statutory standard in question, we are bound to accept the agency view if it is not arbitrary or capricious or inconsistent with underlying congressional intent. *When Congress has not delegated this function to*

> *the agency, we must undertake full interpretive responsibility ourselves, and we look to the agency view as a relevant, but not controlling, principle.* It remains for this court initially to exercise its responsibility to interpret the statute to determine whether Congress delegated the definitional function to the agency.

Vanguard Interstate Tours v. ICC, 735 F.2d 591, 596 (D.C. Cir. 1984); *Trailways, Inc. v. ICC*, 727 F.2d 1284, 1288 (D.C. Cir. 1984).

If Congress intended a particular provision to *limit* the authority of an agency, deferring to an agency decision which eviscerated that provision would foil that legislative intent. When Congress limits the discretion of an agency, a court is remiss if it permits the agency to circumvent that limitation through construction of the statute.[2] It is doubly remiss if in doing so it violates a clear grant of specific management discretion to another agency.

In Chapter 71 of Title 5 ("Labor-Management Relations"), which creates the FLRA, Congress specifically provided that "nothing in [Chapter 71] shall *affect* the authority of any management official of any agency ... in accordance with applicable laws ... to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B) (emphasis added). This specific recognition of authority in all federal agencies affirmatively

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[2] In Department of Justice v. FLRA, 709 F.2d 724, 729-30 (D.C. Cir. 1983), the FLRA tried to require bargaining by an agency over procedural protections for probationary employees. (The right to dismiss probationary employees is reserved to management under provisions in other parts of U.S.C. Title 5.) This court refused to defer to the agency's construction of the labor relations provisions at issue. But in AFGE, Local 2953 v. FLRA, 730 F.2d 1534, 1547-48 (D.C. Cir. 1984), we affirmed the agency's decision that a proposal requiring National Guard units to ignore military efficiency when implementing reductions-in-force was *non*-bargainable.

denies to the FLRA any authority to "affect" the authority of an agency to "contract out." An FLRA decision which encroached on this specifically recognized power would thus violate the plain intent of Congress. Since Congress cannot have intended to give the FLRA discretion to erode the limitations it specifically placed on that Authority by statute, it cannot have intended that courts give great deference to the FLRA's construction of such limitations.[3] To the extent, then, that the FLRA's decision exceeds its "statutory jurisdiction, authority, or limitations," 5 U.S.C. 706(2)(C), it is not entitled to deference. This court "must undertake full interpretive responsibility [itself], and ... look to the agency view as a relevant, but not controlling, principle." *Vanguard Interstate, supra*, 735 F.2d at 596.

II. ANALYSIS

Although the majority asserts that the plain language of the relevant statutory provisions supports *its* construction, *see* Maj. at 9, 16, the relevant language points plainly to exactly the opposite interpretation.

A.

Section 7106 provides:

> (a) Subject to subsection (b) of this section, *nothing in this chapter shall affect the authority of any management official of any agency—*

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[3] The majority relies for its highly deferential stand—*see* Maj. at n.11—on National Treasury Employees Union v. FLRA, 691 F.2d 553 (D.C. Cir. 1982), in which the Authority, with scrupulous concern for the limitations imposed on it by Congress, held that it could *not* order bargaining over a particular proposal without infringing on management rights. This court deferred to the Authority's interpretation. But that decision does *not* require us to uphold the Authority's use of its interpretative power to emasculate specific Congressional restrictions on its authority.

(1) to determine the mission, budget, organization, *number of employees*, and internal security practices of the agency; and

(2) in accordance with applicable laws—

. . .

(B) to assign work, *to make determinations with respect to contracting out*, and to determine the personnel by which agency operations shall be conducted . . . .

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) *at the election of the agency*, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, *work project*, or tour of duty, or on the technology, methods, and means of performing work;

(2) *procedures* which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate *arrangements* for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. § 7106 (emphasis added). In other words, this section of the Act on its face specifically provides that *nothing* in Chapter 71 can circumscribe management's authority to make decisions regarding contracting-out, *except* for the limitations in § 7106(b). Subsection 7106(b) provides that management may negotiate (1) "*procedures* which . . . the agency will observe in exercising [its reserved] authority," (2) "appropriate *arrangements* for employees adversely affected by the exercise of [such] authority" (emphasis added), and (3) at its election, assignment of employees to particular work projects and the means of carrying out such projects.

Significantly, the FLRA did *not* attempt to construe the contract proposal at issue as relating to "procedures . . . the agency will observe" in implementing its

contracting-out decisions, a fact which the majority recognizes. *See* Maj. at n.12. Indeed, it is difficult to comprehend how OMB Circular A-76 *could* fit under the provisions of § 7106 (b). The purpose and scope of that Circular are spelled out in its first paragraph:

> *Purpose.* This Circular establishes Federal policy regarding the performance of commercial activities. The Supplement to the Circular sets forth procedures *for determining whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel.*

OMB Circular No. A-76 (rev. Aug. 4, 1983) (emphasis added). In other words, the Circular and its accompanying Supplement are designed to offer guidance to agencies in making the decision to contract out—*i.e.*, to provide *substantive policy-making criteria*—not procedures for carrying out decisions already made. If (1) the Circular provides substantive criteria for contracting out, and (2) bargaining over substantive criteria for contracting out is prohibited by law, then (3) a collective bargaining proposal which purports to *require* an agency to meet substantive criteria is *not* negotiable. It therefore does not appear that the FLRA *could* rationally have based its decision on the "procedures" provision of § 7106(b). In any event—even assuming that the language could be twisted into supporting that position—the FLRA did not do so, and this court is prohibited from relying on a ground not advanced by the agency. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) ("administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained"); *NLRB v. Enterprise Association of Pipefitters*, 429 U.S. 507, 522 n.9 (1977) (*Chenery* rule "has not been disturbed" by subsequent decisions).

The majority attempts to escape this problem by arguing that, while the FLRA did not specifically find that this provision was procedural, it nevertheless used "similar" analysis to that used in cases involving procedures, *i.e.*, its "direct interference" test. Maj. at n.12. The simple answer to this is that a test for determining the validity of *procedural* provisions is entirely irrelevant to the validity of *substantive* restrictions. Under § 7106, restrictions on *procedures* which indirectly affect contracting-out by management may well be proper because they fall within § 7106, but *non-procedural* restrictions which affect that *right*—whether directly *or* indirectly—are clearly not.

Moreover, the limited scope of the term "procedures" in subsection (b)(2) is emphasized by subsection (b)(1), in which Congress provided for bargaining over "the employees or positions assigned to any ... work project, ... or on the ... methods, and means of performing work," but *only* "at the election of the agency." Congress recognized the right of any agency to elect to bargain on some subjects that are not mandatory. Congress' specific treatment of *work projects* belies the majority's construction of the statute.[4] It makes little sense to suggest that "contract[ing] out" any specific work project is a mandatory subject of negotiation when this subsection clearly provides that negotiation on "any work project" is "at the election of the agency."

It may be that the key to the majority's opinion is its footnote 12. Although the Authority itself did not hold

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[4] Congress did not define the term "work project" in the Act. By analogy to the term "project works," however, a "work project" may be considered to be a project that constitutes a *part* of the agency's complete work load. *See* Ontario Land Dev't & Beach Protection Ass'n v. FPC, 212 F.2d 227, 232 (D.C. Cir. 1954); *cf.* Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395, 401 (1975) (Congress recognized in definition that "project works" were limited to part of a whole project).

that the proposal at issue was only "a procedure" under § 7106 (b), the majority finds in that footnote that the proposal really *is* merely procedural, and hence the management rights provisions do not apply at all.[5] But neither the Authority's opinion—despite the majority's divination of what that agency meant but did not say—nor the language and history of the statute lends any support to the notion that requiring compliance with substantive decision-making criteria, and subjecting such substantive decisions to arbitral review, is nothing more than a "procedure" for exercising authority to contract out.

B.

The majority, however, does not attempt to rely solely on a *sua sponte* finding that the provision at issue is procedural. Instead, it rests heavily on another limitation it finds in § 7106: the requirement that decisions regarding contracting-out be made "in accordance with applicable laws." The majority perforce construes this to mean "in accordance with the other provisions of Chapter 71."

It should first be pointed out that the FLRA in its opinion did not offer this interpretation of the statute as a basis for its decision, and thus the majority is not only speculating in relying on this as a ground, but is also ignoring the principles of *Chenery*, *supra*. The FLRA, in fact, heretofore has recognized that substantive decisions regarding management rights are *not* reviewable under the grievance procedure:

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[5] If this is, in fact, what the majority is holding, then footnote 12 probably renders the remainder of the majority's opinion— particularly its discussion of the phrase "in accordance with applicable laws"—mere verbiage, because it is crystal clear that "procedures" for carrying out decisions are not within the management rights clause.

> Under the plain language of section 7106(a), of course, "nothing" in the Statute shall "affect the authority" of an agency to exercise the rights enumerated therein. Hence, no matter could be grieved under a procedure negotiated pursuant to section 7121 of the Statute which would deny the authority of an agency to exercise its statutory rights under section 7106.

AFGE Local 2782, 6 F.L.R.A. 314, 319-21 (1981) (footnote omitted). There is no suggestion in *Local 2782* that the phrase "in accordance with applicable laws" can be used to permit grievance review of non-negotiable *substantive* decisions.[6]

But even assuming that the FLRA had proffered this interpretation,[7] it could not withstand scrutiny. Con-

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[6] The FLRA's decision in *Local 2782* dealt with a proposal for repromoting individuals who had been reduced in grade due to management cutbacks. It was not a case where substantive regulations were involved; the FLRA carefully pointed out, 6 F.L.R.A. at 321, that it involved simply "appropriate arrangements for employees adversely affected by management's exercise of its authority under section 7106(a)," which are negotiable under the explicit provisions of 5 U.S.C. § 7106(b)(3).

[7] This interpretation arguably was advanced by the FLRA in National Federation of Federal Employees, Local 1497, 9 F.L.R.A. 151 (1982). In that case, the union proposed that "[w]ork assignments shall not be in violation of prohibited personnel practices nor any relevant law, rule, or regulation." The right to assign work is one of the management rights reserved under § 7106(a). The FLRA held that since the agency was required to exercise its management rights "in accordance with applicable law," a contract provision binding it to do so did not interfere with its rights. 9 F.L.R.A. at 156. Implicit in this determination is the assumption that a violation of the work assignment regulations would fall within the grievance procedure of § 7121, the same argument relied on in this case; as demonstrated here, this view is at odds with the statutory scheme of the Act. But even assuming that the result in *Local 1497* is correct, it does not control this case. The assignment of work to employees in that case—unlike the decision to contract out in *this* case—arguably *does* have an impact on "work-

gress provided that, except for § 7106(b), *nothing* in Chapter 71 shall affect management's authority, "in accordance with applicable laws," to make determinations with respect to contracting-out. To reach its conclusion that the whole grievance procedure is somehow excluded from that sweep, the majority must read the phrase "applicable laws" to include *the remainder of Chapter 71*. Thus, it in effect reads the statute as follows: "Nothing in this chapter [71], *EXCEPT ALL THE OTHER PROVISIONS OF CHAPTER 71, INCLUDING § 7121 (PRESCRIBING GRIEVANCE PROCEDURES)*, shall affect the authority of any management official of any agency ... to make determinations with respect to contracting out ..." (italicized matter supplied). It is absurd to construe the act to say that "*nothing*" in the rest of Chapter 71 affects management's right, but that the rest of Chapter 71 *does* affect that right. This construction is at variance with any reasonable interpretation of the statute. The majority points to nothing in the legislative history which indicates that specifically denominated, non-negotiable rights conferred on "management officials" were nevertheless to be subjected to grievance and arbitral review.

It may be that the majority is not reading the statute that broadly, that not *all* of the remainder of Chapter 71 falls under "applicable laws." It may, perhaps, be suggesting simply that Congress' (unarticulated) intent in § 7106(a) was to shield the decision-making process from *negotiation*, but not from *subsequent review* by labor arbitrators and the FLRA. Again, there is no shred of legislative history which indicates that Congress intended contracting-out decisions to be grievable. But the intent of Congress can be inferred from what it wrote. It did *not* say that contracting-out decisions (and

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ing conditions," and hence might fall under the specific definition of "grievance" in § 7103(a)(9). *See* pages 12-13 *infra*.

the other management rights) are "non-negotiable." Had it done so, grievance review arguably would still remain. Instead, it said that, except for § 7106(b), *nothing in Chapter 71 can affect the right of the agency to make contracting-out decisions*. The latter phrase would be singularly inept if what Congress meant was the former, and at least in the absence of clear Congressional intent or a manifestly unsound result this court should refrain from directly violating the express language adopted by Congress.

C.

Next, even if we assume that (1) the term "applicable laws" *does* include all the rest of Chapter 71, and (2) the exercise of a non-negotiable management right *is* subject to the grievance provisions, it is far from clear that a failure to comply with Circular A-76 would meet the definition of a "grievance" for purposes of 5 U.S.C. § 7121.

The term "grievance" is defined *restrictively* by Congress in 5 U.S.C. § 7103(a)(9)(C)(ii), as here relevant, to *mean*[8] "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation *affecting conditions of employment*" (emphasis added).[9] The

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[8] A statute that defines a term with the phrase "to mean" is generally restrictive; "to include" is generally expansive. The majority's description of the term "conditions of employment" as "expansive," *see* Maj. at 3, is thus incorrect.

[9] The majority also notes that the definition of "grievance" also includes "any matter relating to the employment of any employee," 5 U.S.C. § 7103(a)(9)(B), and then asserts that a violation of substantive contracting-out criteria "surely falls within this definition." Maj. at n.18. But there is nothing "sure" about it. Again, the Authority has not made this claim and the majority offers no support. I note that under the majority's apparent reasoning, the *very decision to adopt a particular economic formula itself would be grievable*, because it might at some time in the future, if implemented, have some effect on employment. There is no indication

term "conditions of employment" is also restrictively defined to *mean* "personnel policies, practices, and matters ... affecting *working conditions*." 5 U.S.C. § 7103(a)(14) (emphasis added). Thus, even under the majority's interpretation of the statute, a violation of agency regulations is a "grievance" under § 7103(a)(9)(C)(ii) *only* to the extent that such violation involves personnel policies and practices or the *working conditions* of the employees. These are plainly words of limitation—*i.e.*, not *all* violations are grievable—and there is *no* indication that such limitation was inserted inadvertently.

The majority's footnote suggestion that Circular A-76 may have something to do with personnel policies or practices is insubstantial.[10] It must, then, be fitted (if anywhere) under the phrase "matters ... affecting working conditions." But a contracting-out decision, even when it results in a loss of jobs, is not necessarily a decision affecting the *working conditions* of the employees. While ordinarily the term "working conditions" is to be broadly interpreted, *see Independent Federation of Flight Attendants v. Trans World Airlines*,

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that Congress intended such decisions to be subject to arbitral review.

[10] The majority asserts that even if the Supreme Court's interpretation of "working conditions" *(see infra)* applies, failure to comply with the Circular's substantive economic guidelines for making contracting-out decisions would nevertheless "undoubtedly fall under the umbrella of personnel policies or practices." Not even the Authority in this case has suggested that substantive contracting-out criteria are transmuted into "personnel policies or practices" by virtue of the fact that they may at some point have some sort of impact on the continued employment of particular employees. Not surprisingly, the majority offers no support whatever for this extraordinarily broad reading. Had Congress intended the term "conditions of employment" to include "anything which has or may at some time in the future have an impact on the employment of an employee," it could easily have said so. It did not.

Inc., 1655 F.2d 155, 157 (8th Cir. 1981), it nevertheless "has a . . . specific meaning in the language of industrial relations," *Corning Glass Works v. Brennan*, 417 U.S. 188, 202 (1974), and clearly means "something less than the employment relationship in its entirety." *Southern Railway Co. v. OSHRC*, 539 F.2d 335, 339 (4th Cir.), *cert. denied*, 429 U.S. 999 (1976). In interpreting the same term in another statute, the Supreme Court explained that "the element of working conditions encompasses two subfactors: 'surroundings' and 'hazards.'" *Corning Glass, supra*, 417 U.S. at 202 (interpreting the Equal Pay Act). This court subsequently noted that *only* "surroundings" and "hazards" fall within the labor relations meaning of "working conditions," *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 452 n.153 (D.C. Cir. 1976), and in the FLRA we are dealing with a "labor relations" act. With reference to the term "working conditions" in yet another act, other circuits have held that the term refers to the "environmental area in which an employee customarily goes about his daily tasks." *Columbia Gas of Pennsylvania, Inc. v. Marshall*, 636 F.2d 913, 916 (3d Cir. 1980); *Southern Railway, supra*, 539 F.2d at 339. There is no indication that the term "working conditions" in the statute at issue here (which was used by Congress several years after the *Corning Glass* decision, presumably with knowledge of the meaning assigned to those words by the Court) was intended to have a different, much broader meaning that it enjoys in other labor relations statutes passed by Congress.[11]

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[11] The majority relies on Department of Defense v. FLRA, 685 F.2d 641 (D.C. Cir. 1982), as sanctioning a "broad" construction of the phrase "conditions of employment" in the Act. That case, however, involved union proposals relating to (1) registration of employee automobiles, and (2) provision of certain consumer goods to employees in overseas post exchanges. Both provisions fall clearly within the scope of personnel practices and procedures, and nei-

It might be argued, on analogy to the National Labor Relations Act (NLRA), that contracting-out decisions *do* fall within the term "conditions of employment." In one NLRA case, *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210 (1964), the Supreme Court interpreted the term—which is *not* defined in the NLRA—to include contracting-out. However, in the Federal Labor Relations Act, unlike the NLRA, Congress—which presumably was aware of both *Fibreboard Paper* and *Corning Glass*—chose to define the term *strictly* in a much narrower fashion: it means *only* personnel policies and practices and matters affecting "working conditions." The meaning attached to a term in one statute, where Congress has not defined it, is irrelevant to its meaning in another statute where Congress *has* defined it. It is the phrase *working conditions*, not *conditions of employment*, which acts to narrow the scope of grievances under the FLRA.[12]

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ther even remotely interferes with any reserved management right.

I am unpersuaded by the majority's flat assertion—it is nothing more—that Congress' definition of "working conditions" in one statute simply "does not apply" in another statute. Noting that Congress did not elaborate on its definition in the statute's legislative history, the majority just presumes that it must have meant something different in this statute than it meant when it used the identical phrase in other statutes. But the most plausible explanation for the lack of discussion in the legislative materials is that Congress assumed that its use of the words "working conditions"—words that it had used previously and which the Supreme Court recognized have a definite, specialized meaning in the labor relations field—made it unnecessary to waste additional pages of its committee reports illuminating the obvious.

[12] I must note that, contrary to the majority's assertion, I do *not* "maintain[ ] that grievances are restricted to claims involving surroundings and hazards." *See* Maj. at n.18. On the contrary, the statute at issue requires bargaining over (1) "personnel policies," and (2) personnel "practices," as well as (3) "matters . . . affecting working conditions." 5 U.S.C. § 7103(a)(14).

Since a violation of the regulation involved in this case would be grievable only to the extent it affected the environmental conditions under which employees work, it is difficult to see what sort of violation of Circular A-76 could have any effect on the *working conditions*—as opposed to the continued employment—of the bargaining unit employees. The Circular governs decisions regarding *when* agencies should contract out; it does not specify the internal agency personnel policies which would implement such decisions. It conceivably could result in the termination of an employee, but would have little or no effect on *conditions* in the workplace.

D.

The FLRA itself apparently recognizes that some claimed violations of the Circular will turn out to be non-grievable, but insists that *each claimed violation* must in the first instance go to an arbitrator.[13] Under that approach, the arbitrator would decide whether or not the violation is grievable, subject to FLRA review.[14] The FLRA has flatly refused to supply any guidance as to which parts (if any) of the Circular it thinks might be grievable. The EEOC sought such

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[13] That would, as pointed out *supra*, submit each work project contracted out to *mandatory* negotiation, in violation of the purely elective negotiation provided for in § 7106(b)(1).

[14] FLRA review of an arbitrator's decision is very similar to judicial review of ordinary arbitral awards. It may set aside an award only on two grounds: "(1) because it is contrary to any law, rule, or regulation; or (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations." 5 U.S.C. § 7122(a). Thus, the majority's construction assures that *every* managerial decision with respect to "contracting out," if questioned, would ultimately be made, not by the agency, but by the arbitrator *practically free of any real review*.

guidance in its petition for reconsideration,[15] but the FLRA, finding that the request presented no "extraordinary circumstances," curtly denied it.[16] Hence, under the FLRA's construction, *every alleged violation of the Circular, the basic purpose of which is to provide SUBSTANTIVE guidance for management decisions regarding contracting out, must go to an arbitrator.*

The FLRA's cavalier, conclusory treatment of the EEOC's legitimate request can be seen as an implicit admission that disclosure of the parts it considers *might* be grievable would amount to such an extreme denial of elementary managerial authority as to make it perfectly obvious that its construction is a plain violation of the

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[15] The EEOC explained its request for clarification in its letter requesting reconsideration:

> For example, OMB Circular A-76 and other applicable laws and regulations concerning contracting out contain procedures for the guidance of management in the technical aspects of contracting out which do not directly affect conditions of employment. . . .
>
> [I]t seems clear to us that the Union proposal at issue, is not, *on its face*, limited to conditions of employment. . . . Since the EEOC has many contracts with no direct or indirect impact on conditions of employment of bargaining unit members, we are asking the FLRA to explain in what fashion OMB Circular A-76 and other applicable laws and regulations concerning contracting out fall within the ambit of the scope of bargaining and the grievance resolution machinery under the Statute.

[16] The Authority finds that such a request does not establish "extraordinary circumstances" warranting reconsideration as required under section 2429.17 of the Authority's Rules and Regulations. Rather, the Agency in essence is asking the Authority to make arbitrability determinations in the absence of a specific factual context. To the extent that an arbitrability question may arise in the future, the Agency may, of course, avail itself of the procedures set forth in section 7121 of the Statute for the resolution of such questions.

AFGE, Nat'l Council of EEOC Locals, 10 F.L.R.A. No. 1 (Mar. 18, 1983) (footnote omitted) (order denying reconsideration).

intent expressed by Congress. The same conclusion can be reached with respect to the construction adopted by the majority here. The majority's construction assures that *every* managerial decision with respect to "contracting-out," if questioned, will ultimately be made, not by the agency, but by an arbitrator, subject to very limited review. This results in a complete negation of the intent expressed by Congress.

This interpretation of the grievance procedure offers the union a fertile source of weapons for obstructing or delaying contracting-out decisions, a situation Congress specifically sought to prevent. It is not difficult to visualize what will happen. The union can file a grievance, claiming that one of the technical standards of the Circular (wholly unrelated to working conditions) was not complied with. The claim as to that particular project must go to an arbitrator, who on a case-by-case basis will evaluate it. Assuming that the arbitrator correctly follows the law, the grievance will be denied. The union then will file exceptions to the award with the FLRA, and months—or, drawing on the experience of the National Labor Relations Board, even *years* —later, the FLRA may deny the exceptions. Review in the court of appeals may follow.[17]

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[17] Review in the court of appeals is governed by 5 U.S.C. § 7123(a), which grants review to:

> [a]ny person aggrieved by any final order of the Authority *other than an order under—*
>
> (1) *section 7122 of this title (involving an award by an arbitrator)*, unless the order involves an unfair labor practice under section 7118 of this title....

(Emphasis added.) Thus, Congress specifically has removed FLRA actions approving or disapproving most arbitral awards from direct judicial review. (Judicial review may still be available if the FLRA seeks judicial enforcement under 5 U.S.C. § 7123(b).) Without doubting the good faith of the FLRA, I note that should it later attempt to thwart the will of Congress by whittling away specifically reserved management rights through the use of case-

Even if the grievance is eventually denied, and that denial is affirmed, the prolonged litigation will have cast a cloud over the agency's contracting-out decision, subjected the decision to considerable delay, and wasted valuable agency assets on an essentially frivolous claim. This extraordinary potential for vexatious litigation will significantly infringe upon management's specifically designated right to make contracting-out decisions.[18] The majority's construction thus fails to comply with Congress' admonition that Chapter 71 "be interpreted in a manner consistent with the requirement of an effective and efficient government." 5 U.S.C. § 7101(b).

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by-case arbitration, there may be little the courts can do to correct it. The FLRA's policy of forcing all alleged violations—whether ultimately found grievable or not—to go to an arbitrator in the first instance may effectively shield future decisions plainly inconsistent with the will of Congress.

[18] The EEOC in its brief explains the possible consequences of this kind of substantive review:

> [A]n EEOC employee could challenge the agency's contracting-out decision by arguing that the underlying comparative cost analysis [one of the standards set forth in the Circular] was flawed. If the issue went to arbitration, an arbitrator could decide that the analysis was inadequate under the [Circular's] guidelines ... and therefore did not justify the Agency's conclusion that the commercial activity in question could be performed most inexpensively by a private source. The ultimate result could be a ruling sustaining the employee's claim, and requiring the EEOC to reconsider its contracting-out determinations after conducting another comparative cost analysis.

Reply Brief for Petitioner at 3-4. Under the majority's construction of the statute, avoidance of this scenario depends greatly on the good faith of the FLRA in subsequently holding such direct review of substantive decisions to be non-grievable. There is, however, nothing in the decision under review which rules out the possibility that the FLRA may wind up reviewing all such determinations in grievance proceedings.

IV. CONCLUSION

All of the above was recognized by the union; its apparent goal was to incorporate *substantive* contracting out criteria (over which neither it nor management may bargain), into the collective bargaining agreement, which would make them grievable and hence would subject them to arbitral review. The union's pursuit of this case is utterly inexplicable on any other basis.[19] Yet the FLRA and the majority hold that contracting out and the other reserved rights *already* are covered by the grievance mechanism, and that the processes and criteria used by an agency in making contracting-out determinations must be reviewed by arbitrators and the FLRA through that mechanism. For the reasons set forth above, it is my view that such holding is completely contrary to the language of the applicable statutes, drastically undercuts the specific statutory right of management to contract out, and effectively guts the specific reserved limitations that Congress placed on the agency's duty to bargain and the authority of the FLRA.

I accordingly dissent.

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[19] If, as the majority claims, it is entirely obvious from the statute that violations of the Circular are already grievable as a matter of law, why would the union waste its time, effort, and money in pursuing first the contract proposal and now this action? Even if the EEOC eventually agrees to the proposal—which would contradict the intent of Congress and which, even under the majority's construction, the agency obviously is not required to do—the union's remedies for violations of the Circular are, under the majority's construction, exactly the same. It seems absurd to talk of "bargaining" over a proposal which the majority believes will impose no cost on the agency and confer no benefit on the employees.

APPENDIX B

UNITES STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 82-2310

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL., INTERVENOR

[Filed Dec. 3, 1984]

Before: WRIGHT and TAMM, *Circuit Judges* and MACKINNON, *Senior Circuit Judge**

ORDER

On consideration of petitioner's petition for rehearing, it is ORDERED, by the Court, that the petition is denied.

Per Curiam

For the Court
GEORGE A. FISHER, *Clerk*

By: /s/Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

*Senior Circuit Judge MacKinnon would grant the petition for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 82-2310

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, ET AL.,
INTERVENOR

Filed Dec. 3, 1984

Before: ROBINSON, *Chief Judge*, WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA, and STARR, *Circuit Judges**

ORDER

Petitioner's suggestion for rehearing *en banc* has been circulated to the full Court. A majority of the Judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that petitioner's suggestion is denied.

Per Curiam

For the Court
GEORGE A. FISHER, *Clerk*

By: /s/Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

*Circuit Judges Bork, Scalia and Starr would grant the suggestion for rehearing *en banc*

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 0-NG-314

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS
UNION

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AGENCY

DECISION AND ORDER ON NEGOTIABILITY ISSUES

The petition for review in this case comes before the Authority pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and raises issues concerning the negotiability of three Union proposals. Upon consideration of the entire record, including the parties' contentions, the Authority makes the following determinations.

Union Proposal 1

> Section 1—The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out.

In agreement with the Union, the Authority finds this proposal is not inconsistent with management's right to "make determinations with respect to contracting out"under section 7106(a)(2)(B) of the Statute. The proposal would require management to exercise its

right to make contracting out determinations in accordance with whatever applicable laws and regulations exist at the time of such action. Hence, it would contractually recognize external limitations on management's right but would not establish, either expressly or by incorporation, any particular substantive limitations on management.

Thus, this proposal is distinguishable from proposal 1 which was held nonnegotiable in *National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 FLRA No. 105 (1981), *affirmed as to other matters sub nom. National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority*, ___ F.2d ___ (D.C. Cir. 1982). That proposal, in contrast with the present disputed proposal, would have incorporated into the parties' agreement specific limitations on management's discretion reflecting particular provisions of OMB Circular No. A-76; hence, it would have required management to comply with those terms during the life of the contract regardless of whether the directive from which they were derived were to be revised or rescinded. In reaching that decision the Authority stated, at 4 of the decision, as follows:

> This [nonnegotiable] proposal is to be distinguished from one which requires the Agency to act in accordance with whatever applicable OMB directives/circulars may be extant at the time the Agency is exercising its right to contract out. Such a proposal would only require that when management acts, it does so in accordance with applicable OMB directives existing at the time.

Accordingly, it is concluded that the present proposal is not inconsistent with section 7106(a)(2)(B).

The Agency's further claim that the proposal would conflict with OMB Circular No. A-76, itself, because it would subject grievances concerning application of the

Circular to the negotiated grievance procedure, also cannot be sustained. The Agency states in this regard that grievances arising in connection with the application of the Circular only can be pursued through the procedures prescribed by the Circular, *i.e.*, that the provisions of the Circular limit the scope and coverage of grievance procedures negotiated pursuant to the Statute. This contention is without merit. A materially identical argument with respect to directives of the Office of Personnel Management was considered and rejected in *American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 FLRA No. 56 (1981). There, the Authority concluded, at 9 of the decision, that "OPM regulations . . . may not be applied in a manner inconsistent with the scope of negotiated grievance procedures allowed under section 7121 of the Statute." [Footnote omitted.] Rather, the Authority held that the Statute and its relevant legislative history required that grievance procedures negotiated under section 7121 cover all matters that under the provisions of law could be submitted to the grievance procedure unless the parties exclude them through bargaining. Consequently, even assuming in the present case that a conflict between the proposal and the Circular exists, as claimed by the agency, and that the Circular is a Government-wide rule or regulation within the meaning of the Statute, it must be concluded herein, for the reasons stated in *Bureau of the Census*, that the Circular in question does not limit the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure.

It must be emphasized in this regard that the Agency has misinterpreted the legal effect of the disputed proposal: the proposal would not itself change the scope and coverage of the parties' grievance procedure. That is, under the Statute, even in the absence of the con-

tract provision proposed by the Union, disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure unless the particular grievance is inconsistent with law (*see American Federation of Government Employees, AFL-CIO, Local 3403 and National Science Foundation, Washington, D.C.*, 6 FLRA No. 114 (1981) (proposal 3)) or unless the parties exclude such grievances through negotiations (*see, e.g., American Federation of Government Employees, AFL-CIO, Local 3354 and U.S. Department of Agriculture, Farmers Home Administration, St. Louis, Missouri*, 3 FLRA 320 (1980)).

In view of the above, the Authority concludes that Union Proposal 1 is within the duty to bargain.

Union Proposal 2

> Section II—The EMPLOYER shall notify the council and appropriate Local President(s) of its intention to solicit bids for contract work which could result in a reduction-in-force or transfer or abolition of function affecting employees in the unit. Such advance notice shall provide a full explanation of the reasons for such actions and provide the UNION sufficient opportunity to respond in writing.

This proposal would provide the Union with advance notice and an opportunity to respond to the Agency's reasons for its "intention" to contract out work when such action could adversely impact unit employees. Giving the language of the proposal its common meaning in the absence of any contrary indication in the record, the Authority finds that the proposal would apply when management has decided to solicit bids for contract work which in its judgment could lead to, *e.g.*, a reduction in force, but has not yet implemented its decision. It is concluded, as claimed by the Union, that under

these circumstances the proposal is not too remote and speculative, and instead would directly affect the conditions of employment of unit employees under the Statute so as to be within the duty to bargain to the extent not inconsistent with applicable law or regulation.

As to law, the Agency's claim that the proposal would violate its statutory right to make determinations with respect to contracting out cannot be sustained. The Authority finds, rather, that the proposal is essentially procedural and would only require advance notice to the Union and an opportunity to reply, as already stated. Thus, the proposal is within the ambit of section 7106(b)(2) of the Statute which provides that "procedures which management officials will observe in exercising" their reserved rights are negotiable. In this regard, the proposal clearly would not prevent the Agency from acting at all to make and implement its determination with respect to contracting out and thus is a negotiable procedure under section 7106(b)(2). *See American Federation of Government Employees, AFL-CIO, Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange, Fort Dix, New Jersey*, 2 FLRA 152 (1979), *enforced sub nom. Department of Defense v. Federal Labor Relations Authority*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA*, ___ U.S. ___, 102 S.Ct. 1443 (1982). *Cf. National Federation of Federal Employees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 FLRA No. 105 (1981), *affirmed sub nom. National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority*, ___ F.2d ___ (D.C. Cir. 1982) (wherein proposal 1, requiring the agency to make available to the union certain "milestone charts" used by management in deciding whether to contract out, was held nonnegotiable be-

cause it involved the union directly into the internal deliberative process).

Finally, as to regulation, the Agency relies on 41 CFR §§ 1-1.011-2 and 1-2.202-1. Assuming without deciding that these regulations are Government-wide within the meaning of section 7117(a) of the Statute so that they could bar negotiation of a conflicting proposal, the Agency has not established that Union Proposal 2 is inconsistent with such regulations. Specifically, section 1-1.011-2 declares that Congress' policy is to promote economy, efficiency and effectiveness in the procurement of property and services by taking or avoiding certain actions. There is no implication, however, that lawful collective bargaining is to be avoided. Further, section 1-2.202-1 provides that it is Government policy, consistent with its needs, to allow sufficient time between the distribution of an invitation for bids and the date for opening bids to permit prospective bidders to prepare and submit bids. Thus, this regulation is concerned with what happens *after* a solicitation of bids whereas the proposal is concerned with the period *prior* to such solicitation. Thus, there is no facial inconsistency between the disputed proposal and this regulation and the Agency has not established in the record that there is a conflict.

In summary, Union Proposal 2 concerns conditions of employment under the Statute and the Agency has not established that it is inconsistent with section 7106(a)(2)(B) of the Statute or with the rules or regulations cited by the Agency. Hence, it is within the duty to bargain.

Union Proposal 3

> Section III—The parties shall negotiate the [e]ffect of any contracting-out decision which could alter the conditions of employment in the bargaining unit prior to implementing the decision to contract-out. The EMPLOYER agrees

> to eliminate or minimize any potential adverse [e]ffect through reassignment or training and to take whatever other action may be necessary to protect bargaining unit employees.

The Union's statement before the Authority indicates that its proposal would require the Agency to minimize the effect of contracting out as to "all persons being affected." Thus, under the language of the disputed proposal, confirmed by the Union's statement as to its intended meaning, the proposal would go beyond requiring the Agency generally to minimize the effect of contracting out on the bargaining unit with due regard for applicable laws including the Statute, as did the proposals held negotiable by the Authority in *International Association of Machinists and Aerospace Workers, Local 2424 and Department of the Army, Aberdeen Proving Ground, Maryland*, 8 FLRA No. 117 (1982). Rather, the instant proposal would specifically require the Agency to reassign or train "all persons" who would be adversely affected by contracting out and to take "whatever other action may be necessary" to protect each one of them.

Accordingly, in agreement with the Agency, the Authority concludes that this proposal in effect would preserve absolute employment security for such employees. As a consequence it would not constitute an "appropriate" arrangement for employees adversely affected by management's exercise of its statutory rights.[1] *Cf. National Federation of Federal Employ-*

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[1] Section 7106(b)(3) of the Statute provides:

> § 7106. *Management rights*
>
> . . . .
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating—
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> . . . .

ees, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, 6 FLRA No. 105 (1981), *affirmed as to other matters sub nom. National Federation of Federal Employees, Local 1167 v. Federal Labor Relations Authority*, ___ F.2d ___ (D.C. Cir. 1982) (wherein proposal 4, requiring the agency only to *consider* restricting new hires in order to retain bargaining unit employees in contracting out situations, constituted an "appropriate arrangement" under section 7106(b)(3)). Rather, this proposal would directly interfere with the Agency's exercise of, *inter alia*, its right under section 7106(a)(2)(A) of the Statute to "layoff" employees and, thus, is outside the duty to bargain.[2] *National Treasury Employees Union and Internal Revenue Service*, 7 FLRA No. 42 (1981) (proposal 5).

Therefore, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning Union Proposals 1 and 2.[3] IT IS FURTHER ORDERED that the portion

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(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

[2] In view of this decision, the Authority finds its unnecessary to rule as to other statutory rights claimed by the Agency to be violated by the proposal.

[3] In finding these proposals to be negotiable, the Authority makes no judgment as to their merits.

of the Union's petition for review concerning Union Proposal 3 be, and it hereby is, dismissed.

Issued, Washington, D.C. September 2, 1982

/s/ Ronald W. Haughton
RONALD W. HAUGHTON, *Chairman*

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, *Member*

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE, *Member*

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 82-2310

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, ET AL.,
INTERVENOR

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

[Filed Sept. 21, 1984]

Before: WRIGHT AND TAMM, *Circuit Judges*, and MACKINNON, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard in a petition for review and cross-application for enforcement of an order of the Federal Labor Relations Authority, and was argued by counsel. On consideration thereof it is

ORDERED, and ADJUDGED, by this Court, that the Authority's order is enforced, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

GEORGE A. FISHER, *Clerk*

Date: September 21, 1984
Opinion for the Court filed by Circuit Judge Tamm.
Dissenting opinion filed by Senior Circuit Judge MacKinnon.